SINGAPORE REPORTS

Lim Xue Shan & Anor v Ong Kim Cheong

HIGH COURT (SINGAPORE) — SUIT NO 1624 OF 1982
RAJAH J
18 SEPTEMBER 1990

Land Law — Sale and purchase of property — Purchase by foreigner — Minister disapproved of purchase — Whether deposit recoverable — Residential Property Act (Cap 274, 1985 Ed), ss 3(1)(c), (2)(c), 25 & 36

Contract — Agreement for sale and purchase of property — Foreign buyer — Violation of statute — Whether deposit paid by purchaser recoverable

Words and Phrases — 'Desires to purchase' — Residential Property Act (Cap 274, 1985 Ed), s 25(2)

By an agreement in writing, the plaintiffs as purchasers and the defendant as vendor agreed to sell a piece of property classified as residential property under the Residential Property Act (Cap 274, 1985 Ed) ('the Act'). The plaintiffs paid a sum as deposit under the agreement. Both the plaintiffs were foreign persons under the Act. The Controller of Residential Property whose approval was needed to complete the transfer of property refused permission. The plaintiffs then demanded the return of the deposit that they had paid to the defendants, which the defendants refused to do. The plaintiffs then started the present action.

Held, dismissing the plaintiffs' claim:

(1) By entering into an unconditional written contract for the sale and purchase of residential property before the plaintiffs had permission, the plaintiffs and the defendant had contravened the Act. A foreign person no sooner has he formed the intention to purchase property subject to the provisions of the Act, must before he signs any contract apply for ministerial approval.

(2) By virtue of s 25(2) read with s 36(1) of the Act, the agreement between the plaintiffs and the defendant was an illegal contract. As such, no enforceable rights could arise under the contract.

Legislation referred to
Residential Property Act (Cap 274, 1985 Ed) ss 3, 25, 36

Roderick Martin (*M Rasanayagam* (*Ms*) with him) for the plaintiffs.
Cheong Yuen Hee for the defendant.

Cur Adv Vult

Rajah J: By an agreement in writing dated 19 January 1981 (hereinafter called 'the said agreement') made between the defendant as vendor and the plaintiffs as purchasers, the plaintiffs agreed to purchase and the defendant agreed to sell the property known as No 55 Oei Tiong Ham Park, Singapore (hereinafter called 'the said property') for the sum of $1,310,000 subject to existing tenancy.

It is not disputed that under the said contract a sum of $131,000 has been paid by way of deposit to the defendant as vendor.

It is also not disputed that the said property is residential property within the meaning of the Residential Property Act (Cap 274, 1985 Ed) ('the Act') and that both the plaintiffs (the purchasers herein), though permanent residents of Singapore, were foreign persons within the meaning of the Act and that any transfer of the said property to them, whether for consideration or by way of gift or otherwise, is prohibited by and would be null and void under s 3 of the Act and that, unless the purchasers had obtained the approval of the minister under s 25 of the Act, the purchasers would be committing an offence under s 36 of the Act.

On 28 April 1981, the Controller of Residential Property in response to the plaintiffs' application dated 2 February 1981 for approval to purchase the said property and in compliance with s 25(11) of the Act conveyed to the plaintiffs' solicitors by notice in writing bearing the same date that the minister had considered the plaintiffs' application and had disapproved it.

The plaintiffs have in fact demanded of the defendant the return of the said deposit, but the defendant has refused and refuses to return the said $131,000.

It is in these circumstances that the plaintiffs have commenced proceedings against the defendant and claim the return of the said sum of $131,000.

The plaintiffs contend that the said agreement has been frustrated by the failure to obtain the minister's approval and that the plaintiffs are accordingly entitled to recover the said deposit as money had and received for a consideration that has wholly failed.

In their amended statement of claim the plaintiffs plead that 'at the time and in consideration of the plaintiffs entering into the said agreement the defendant orally agreed by himself and by his said solicitor with the plaintiffs and warranted to them as an agreement collateral to the said agreement and with the intent that the plaintiffs should rely thereon that the sale and purchase should be subject to the grant of approval by the minister to the plaintiffs to purchase or acquire the said property'. They also plead that 'relying on the said oral agreement and the warranty the plaintiffs duly entered into the said agreement on 19 January 1981 as aforesaid'. 'Further and in the alternative', the plaintiffs say it, 'it was an implied term of the said agreement that if the minister's approval was not obtained the said deposit of $131,000 would be repaid to the plaintiffs and the said agreement would be null and void.'

The plaintiffs also contend that prior to 19 January 1981 the defendant and his solicitor Choo Kwun Kiat knew that both the plaintiffs were foreign persons within the meaning of the Act. The defendant denies this and maintains that it was not until after the minister had refused his approval for the purchase of the said property

did he come to know that the plaintiffs were Indonesian nationals.

On this single issue evidence was led on both sides. I accept the evidence of the defendant and of his then solicitor Mr Choo Kwun Kiat, who acted for him in the sale and purchase, on this issue and find that the defendant came to know of the plaintiffs being Indonesian nationals only after the minister had disapproved of the said purchase on 28 April 1981. It follows from this that there could not have been any oral agreement that the sale and purchase of the said property should be subject to the grant of approval by the minister to the plaintiffs to purchase and acquire the said property.

The defendant in his defence denies that he is liable to repay to the plaintiffs the said sum of $131,000 or any other sum for the reason that by virtue of s 3(1)(c) of the Act no foreign person shall purchase or acquire any residential property or estate or interest therein except by way of a mortgage, charge or reconveyance and that under s 3(2)(c) any such purchase or acquisition shall be null and void. The defendant further denies that there was any term implied or otherwise in the said agreement that the said deposit would be repaid to the plaintiffs if the minister's approval was not obtained.

Mr Martin for the plaintiffs submitted that the issues before the court were basically four in number:

(I) Whether the plaintiffs acquired any interest (legal or equitable) in the property on signing the said agreement.

(II) Whether arising out of this the plaintiffs are, on the basis of money had and received, entitled to succeed in their claim against the defendant for the return of the said sum of $131,000.

(III) Whether the law would imply a term being written into the said agreement that the sale was to be subject to the minister's approval and that whether, if the minister's approval was not obtained, the said agreement 'would go off' and the said deposit of $131,000 would then have to be refunded to the plaintiffs.

(IV) Whether the said agreement had been frustrated by the failure to obtain the minister's approval for the sale and purchase and the plaintiffs are accordingly entitled to recover the said sum from the defendant by virtue of s 2(2) of the Frustrated Contracts Act (Cap 115, 1985 Ed).

Issue I — Legal or equitable interest

It would be useful to set out the various provisions of the Act which have a bearing on this issue. Section 3 of the Act reads:

> (1) Except as provided in this Act —
>
> (a) no person shall, whether for consideration or by way of gift inter vivos or otherwise, transfer any residential property or any estate or interest therein to any foreign person;
>
> (c) no foreign person shall purchase or acquire any residential property or any estate or interest therein except by way of a mortgage, charge or reconveyance.
>
> (2) Any —
>
> (a) transfer of any residential property or of any estate or interest therein by any person to a foreign person made in contravention of subsection (1)(a);
>
> (c) purchase or acquisition of any residential property or of any estate or interest therein by any foreign person, except by way of a mortgage, charge or reconveyance, made in contravention of subsection (1)(c),
>
> shall be null and void.

A foreign person is defined in s 2 of the Act as:

> (a) any person who is not a citizen;
>
> (b) any permanent resident;

Section 25 of the Act relates to applications by foreign persons for approval to purchase or acquire any estate or interest in any residential property. Section 25(2) reads:

> Subject to subsection (14), any foreign person who desires to purchase, acquire or retain any estate or interest in any residential property (referred to in this section as the applicant) shall make application (referred to in this section as the application) to the Controller, in respect thereof, in such form as the Controller may require, for the grant of approval to acquire or to retain residential property, as the case may be.

Section 25(4) provides:

> The Controller shall forward every such application to the Committee; and after consideration thereof, the Committee shall make recommendation thereon to the Minister who may, in his discretion, grant, with or without conditions (or refuse to grant), approval —
>
> (a) for the purchase or acquisition of the estate or interest in the residential property in respect of which the application was made or for the retention of such estate or interest; or
>
> (b) for the purchase or acquisition of the estate or interest in residential property of such class or nature as the applicant may desire to purchase or acquire.

Section 25(11) provides:

> The decision of the Minister to approve or to refuse to approve any application shall be conveyed to the applicant by the Controller by notice in writing.

Section 25(13) provides:

> The decision of the Minister to approve or to refuse to approve any application or, if any representations are made pursuant to subsection (12), his decision to accept or reject the representations, shall be final and shall not be called in question in any court.

Section 36 provides:

> (1) Any person who contravenes or fails to comply with any of the provisions of this Act for which no penalty is expressly provided shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 3 years or to both.

In the instant case the undisputed facts are:

(1) that the purchasers, although permanent residents of Singapore, are not citizens of Singapore as defined in s 2 of the Act;
(2) *that the contract was not made conditional on the minister's approval being obtained*;
(3) that when the parties signed the said agreement the purchasers had not as yet applied under s 25 of the Act for the minister's approval to purchase the said property from the vendor; that in fact the application under s 25 of the Act for the purchase of the property was made by the purchasers on 2 February 1981, some 14 days after the signing of the said agreement; and
(4) that the minister disapproved the purchase of the said property on 28 April 1981.

It is not disputed:

(i) that s 3(1)(c) of the Act forbids the purchase of residential property or any estate or interest therein by a foreign person;
(ii) that s 3(2)(c) declares any such purchase in contravention of s 3(1)(c) to be null and void; and
(iii) that s 25(2) enacts that any foreign person who *desires* (emphasis added) to purchase or acquire any estate or interest in any residential property shall apply to the Controller for the grant of approval to acquire such residential property.

In the instant case the purchasers and the vendor entered into *an unconditional written contract* dated 19 January 1981 for the sale and purchase of residential property some 14 days before the purchasers had applied under s 25(2) of the Act for ministerial permission to acquire such property. To begin with this unconditional contract contravenes both the provisions of s 3 and s 25(2) of the Act. The purchasers by failing to comply with the provisions of s 25(2) have made themselves liable to criminal prosecution under s 36(1) of the Act and on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding three years or to both.

The said agreement by virtue of s 25(2) read with s 36(1) of the Act is an illegal contract. In these circumstances no enforceable rights can arise under the contract.

The question now before the court is whether the plaintiffs are entitled to recover the sum of $131,000 paid by the purchasers to the vendor by way of deposit for the purchase of the said property. In resolving this question I can do no better than to rely on para 1268 of *Chitty On Contracts* (26th Ed) under the heading 'Recovery of Money Paid or Property Transferred under Illegal Contracts':

> Non-recovery of consideration. While cases in which the plaintiff seeks the enforcement of an illegal contract are governed by the maxim ex turpi causa non oritur actio, those in which he seeks some release from its operation fall within the principle in pari delicto potior est conditio defendentis. The result of the application of this principle is that where both parties, contracting on an equal footing, are aware of the illegal nature of the contract, whether it be on its face illegal or whether the common intention be to carry out the contract in an illegal manner, neither party can recover anything paid or transferred thereunder. So, in a contract to secure a title for the plaintiff in return for payment, the plaintiff, when he failed to receive his title, could not recover back what he had paid, the contract being turpis and the parties in pari delicto. A fortiori where the defendant has performed his part of the agreement the plaintiff cannot set up the illegal nature of the transaction in order to recover a deposit or part payment. Thus in *Taylor* v *Chester* [(1869) LR 4 QB 309] the plaintiff failed to recover the half of a £50 banknote deposited with the defendant to secure payment by the plaintiff of the price of wines and suppers supplied by the defendant in her brothel for the purposes of a debauch and of loans of money by the defendant to the plaintiff for expenditure in riot, debauchery and immoral conduct. The court held that the plaintiff failed, since he could not make out his case 'otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party'.

Issue II — Money had and received

Mr Martin contends that the said agreement of sale and purchase by the parties in our case was not illegal in that it did not contravene s 3(1)(e) as neither legal nor equitable interest had passed to the plaintiffs under that agreement. In this case the plaintiffs not only offended the provisions of s 3 of the Act which makes the contract null and void but they have also offended the provisions of s 25(2) of the Act which lays down that any foreign person who desires to purchase or acquire any estate or interest in residential property shall as a first prerequisite make application to the Controller of Housing for the grant of approval to acquire such residential property. To my mind the Act requires that any foreign person desiring to buy residential property must, some time before he enters into a contract for the purchase of the property, get approval of the minister to purchase such residential property. 'Desires to purchase' must refer to a point of time before the signing of the contract. It refers to the state of mind of the foreign person before he signs the contract. It seems to me that a foreign person no sooner has he formed the intention to purchase property subject to the provisions of this Act must before he signs any contract apply for ministerial approval. In the instant case the purchasers have further contravened the Act by not obtaining approval before the signing of the contract. The maxim ex turpi causa non oritur actio therefore applies which means of course that no rights can arise under the contract and that even if both the plaintiffs and defendant were wrongdoers under the Act the maxim in pari delecto fotior est conditio defendentis would operate in favour of the defendant. The had and received argument is therefore rejected.

Issue III — Implied term

In the instant case the obligation to obtain the minister's consent under s 25 of the Act has been categorically cast by

the Act on foreign persons who wish to purchase residential property and they, not having obtained such consent cannot now claim an implied term of the purchase being subject to the minister's approval, more so when the failure to obtain such consent was of their own making; and even more so when such failure is a punishable criminal offence under s 3 of the Act read with s 36(1) of the Act.

Issue IV — Frustration

In the instant case the plaintiffs claim that the contract has been frustrated by failure to obtain the minister's approval for the purchase of the said property. Under the Act the contract we are concerned with is null and void. The question of frustration therefore does not arise. Under the Act it is for the purchasers who are foreign persons to obtain the minister's approval; the purchasers being the party in default will not be entitled to recover any sums of money paid under the contract whether it be any deposit paid by them as security for the performance of their obligations or as part payment of the purchase price.

For these reasons I dismiss the plaintiffs' claim with costs.

Claim dismissed.

Solicitors: *Ramdas & Wong; YH Cheong.*

Reported by *Terence Tan Bian Chye*

Lee Kuan Yew v Devan Nair

HIGH COURT SINGAPORE — SUIT NO 1042 OF 1988
WEE CHONG JIN CJ
3 SEPTEMBER 1990

Civil Procedure — Pleadings — Particulars of defence — Striking out — Defamation — Defences of fair comment and justification — Whether particulars relevant — Rules of the Supreme Court 1970, O 18 r 19

This was a libel action brought by the plaintiff against the defendant. The plaintiff claimed that the defendant stated that the plaintiff had collaborated with foreign powers in their plans to interfere in the internal affairs of Malaysia. The defendant pleaded, inter alia, the defences of fair comment and justification and gave particulars common to both pleas. Further and better particulars were then ordered. Following this, the registrar ordered that part of the particulars and the defence be struck out under O 18 r 19 of the Rules of the Supreme Court 1970 or under the inherent jurisdiction of the court. The defendant appealed.

Held, dismissing the appeal:

(1) The defendant, in giving particulars of the facts on which he relies in support of his plea of fair comment, must clearly confine such particulars to those relevant to the issues on the pleadings.

(2) Here the defendant had set out a list of the names of the dissidents who were detained and gave statutory declarations and the types of psychological pressures against them. These particulars had no bearing on the defences against the alleged libel at all. Accordingly, the appeal was dismissed.

Cases referred to

1 *Kemsley* v *Foot* [1952] AC 345 (refd)
2 *S & K Holdings Ltd* v *Throgmorton Publications Ltd* [1972] 3 All ER 497 (refd)
3 *Polly Peck (Holdings) plc* v *Trelford* [1986] 2 All ER 84 (refd)
4 *Waters* v *Sunday Pictorial Newspapers Ltd* [1961] 2 All ER 758 (refd)

Tan Kok Quan (*Lee Han Tiong* with him) for the plaintiff.
Steven Ang (*Loh Boon Huat* and *Thio Ying Ying (Mrs)* with him) for the defendant.

Cur Adv Vult

Wee Chong Jin CJ: This is a libel action brought by the plaintiff against the defendant. The defendant pleaded, inter alia, the defences of fair comment and justification and gave particulars common to both pleas. By order of court dated 1 November 1988, further and better particulars were ordered. By order of court dated 7 April 1989, the registrar ordered that particulars (viii) under para 10 of the defence and the particulars (viii) of the further and better particulars filed on 25 November 1988 (vide order of court dated 1 November 1988) be struck out under O 18 r 19 of the Rules of the Supreme Court 1970 and alternatively under the inherent jurisdiction of the court. An appeal was brought to this court; and I dismissed the appeal. I now give my reasons.

The plaintiff is the Prime Minister of Singapore since 1959 and was a member of the Malaysian Parliament from